

Before the
Administrative Hearing Commission
State of Missouri



GEORGE TURNER,

Petitioner,

vs.

DIRECTOR OF REVENUE,

Respondent.

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No. 13-1623 RV

DECISION

George Turner is entitled to a personalized license plate reading “SEX DOC.”

Procedure

On September 9, 2013, Turner filed a petition appealing a final decision of the Director of Revenue (“the Director”). The decision denied Turner’s application for a personalized license plate with the configuration SEX DOC. We convened a hearing on the complaint on January 9, 2014. Turner represented himself. Joseph Cox and Jonathan H. Hale represented the Director. The case became ready for our decision when the transcript was filed on March 31, 2012.

Findings of Fact

1. Turner is a Missouri motor vehicle owner. He has a PhD in sexual health. He is an associate professor at the Kansas University School of Social Welfare, where he teaches a class on human sexuality. He is a psychotherapist and certified sex therapist and also maintains a private practice specializing in sexual health and the treatment of patients with sexual problems.

2. On February 28, 2013, Turner submitted the necessary fee and application for a personalized license plate with the configuration of letters, “SEX DOC.”

3. The Director sent a letter to Turner dated March 12, 2013, stating, “Your request is not available under the motor vehicle bureau’s rules and regulations.” *Resp. Ex. A*. Turner did not receive the letter until April 26, 2013.

4. On July 13, 2013, Turner wrote to the Department, requesting reconsideration of his application. In his letter, he stated, “I am a professional sexual health expert. I am a “Sexuality Doctor”; thus, my application for “SEX DOC” is not only legitimate, but justified as part of marketing my business and my professional responsibility to de-stigmatize sexual health.” *Resp. Ex. D*.

5. The Director issued a final decision on August 13, 2013. The final decision states only that “Upon reconsideration of your application, the Department maintains the original decision to deny this configuration.” *Resp. Ex. B*.

Conclusions of Law

We have jurisdiction to hear Turner’s complaint. § 621.050.1;¹ *State v. Deutsch*, 751 S.W.2d 132, 134 (1988). Turner has the burden of proof. § 621.050.2.² We do not merely review the Director’s decision, but step into his shoes and remake his decision, exercising any discretion the Director may exercise. *Gettler v. Director of Revenue*, 411 S.W.3d 339, 344 (Mo. App. W.D., 2013).

¹ RSMo 2000. Statutory references are to the RSMo Supp. 2013 unless otherwise indicated.

² Turner has raised no constitutional issue in his appeal, *but see Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) (“As we have said, the district court correctly determined that the DOR failed in this litigation to advance any constitutional justification for failing to renew Ms. Lewis’s plate. This should conclude the inquiry, for “[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions,” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). “**Ms. Lewis is not required to prove the absence of a constitutional basis for the DOR’s action; she is simply required to make the initial showing that her speech has been restricted. Once Ms. Lewis made that showing, the burden fell on the DOR to advance a constitutional justification for its action, which it has failed to do.**”) (Emphasis added).

The Director cited no law or rationale in his final decision letter, but his answer provides the notice required for due process. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App. E.D., 1984). In that answer, he asks us to uphold his determination that a license plate with the configuration SEX DOC is obscene, patently offensive, and offensive to good taste or decency. He cites § 301.144.3 and Regulation 12 CSR 10-23.185.

Section 301.144.3 provides:

No personalized license plates shall be issued containing any letters, numbers or combination of letters and numbers which are obscene, profane, patently offensive or contemptuous of a racial or ethnic group, or offensive to good taste or decency, or would present an unreasonable danger to the health or safety of the applicant, of other users of streets and highways, or of the public in any location where the vehicle with such a plate may be found. . . . The director shall not apply the provisions of this statute in a way that violates the Missouri or United States Constitutions as interpreted by the courts with controlling authority in the state of Missouri. The primary purpose of motor vehicle license plates is to identify motor vehicles. Nothing in the issuance of a personalized license plate creates a designated or limited public forum. Nothing contained in this subsection shall be interpreted to prohibit the use of license plates, which are no longer valid for registration purposes, as collector's items or for decorative purposes.

Section 301.144.1 instructs the Director to “issue rules and regulations setting the standards and establishing the procedure for application for and issuance of the special personalized license plates[.]” Pursuant to that authority, the Director’s Regulation 12 CSR 10-23.185 provides:

(2) The following terms, as used in this rule, shall be defined as follows:

(A) Obscene – Language or symbols which represent or describe . . . sexual acts in a patently offensive manner or make lewd reference to the male or female sexual organs and appeal to the prurient interests of the average person applying contemporary community standards. . . . Prurient interests, as used in this definition, shall mean shameful or morbid interest in . . . sex . . . that goes substantially beyond customary limits or candor in description or representation of these matters[.]

* * *

(3) No motor vehicle license plate will be issued by the Department of Revenue if the language or symbols on the plate are obscene or profane. In order to make this determination, the Department of Revenue will look to the way the average person applying contemporary community standards would view the license plate. Factors which the Department of Revenue may consider in this regard include, but are not limited to:

(A) An explanation by the registrant as to why s/he chose particular language or symbols to be on his/her personalized motor vehicle license plate;

(B) Complaints from the public regarding a license plate with the same letters, numbers or symbols as that requested or held by the registrant;

(C) Complaints from the public regarding a license plate with similar letters, numbers or symbols as that requested or held by the registrant;

(D) Dictionary definitions of the language or symbols requested by the registrant; and

(E) Information from other states regarding motor vehicle plates which have not been issued by them because they found them to be obscene or profane.

Whether Turner's requested plate is obscene, appeals to the prurient interest, or is patently offensive is a factual issue. *Gettler*, 411 S.W.3d at 343. This Commission, therefore, is charged with making that determination in accordance with our understanding of the average person in the community. *Id.*, citing *Smith v. U.S.*, 431 U.S. 291, 305 (1977). In making that determination, we consider the same factors that the Director may consider in accordance with the guidance set forth in 12 CSR 10-23.185.

First, we consider the explanation Turner provided to the Director for why he chose the configuration SEX DOC for his license plate. Turner explained that he is a sex therapist and that he believes the plate would serve the dual purpose of helping him market his services and

destigmatizing problems related to sexual health. The Director presented no evidence to the contrary.

Second, we consider whether the proposed plate configuration is obscene to the average person applying contemporary community standards. The Director presented no evidence on this point, although one of the Director's attorneys at the hearing stated that if a five-year-old asks what the plate means, "how do you explain that to a five-year-old?" Tr. 15. He also stated, "There are a lot of questions out there, when we put the word 'sex' out there in public, especially on a government-issued plate. That's really the gist of it and why we denied it." *Id.* Turner rejoined that he did not believe his community in Kansas City would find the word obscene.

Statements of counsel are not evidence. *State v. Dowell*, 25 S.W.3d 594, 609 (Mo. App., W.D. 2000). Even if we considered the Director's counsel's explanation as evidence, however, it does not establish community standards. Again, however, even if we considered it as an attempt to do so, we are guided by the Director's own regulation. "SEX DOC" does not describe sexual acts, make lewd reference to sexual organs, or appeal to a shameful or morbid interest in sex that goes substantially beyond customary limits or candor.

Third, we consider whether the Director has received complaints about license plates with similar configurations. The Director presented evidence of license plates that he has rejected containing the word "sex" in a number of combinations with other numbers and letters, but no evidence as to complaints about similar plates, as specified by the regulation. There is a difference – complaints from the public would be more probative of community standards than the Director's own decisions. But we have no evidence of the former.

Fourth, we consider the dictionary definition of the word "sex." Again, the Director presented no evidence on this point. Turner submitted pages from www.merriam-webster.com defining "fuck," "shit," and "sex." *Pet. Ex. 2*. He notes that the on-line dictionary states that

“fuck” is usually obscene, and usually vulgar. “Shit” is usually vulgar. “Sex,” however is defined as “physical activity in which people touch each other’s bodies, kiss each other, etc. : physical activity that is related to and often includes sexual intercourse,” and is noted as neither obscene nor vulgar. We conclude that the word “sex” is not obscene.

Finally, the Director may consider information from other states regarding license plates they have not issued because they found them to be obscene or profane. Again, the Director presented no evidence on this point. Turner, however, testified that one of his colleagues in Pennsylvania has the identical plate, and submitted a picture of the plate into evidence.

After considering all of these factors, we conclude that the configuration “SEX DOC” is not obscene.

The Director also asks us to find that the plate should not be issued because it is patently offensive and offensive to good taste or decency. Neither party presented any evidence regarding these standards, nor are they defined by statute or regulation. Therefore, we consult the dictionary to determine the plain meaning of the word. *See E&B Granite, Inc. v. Dir. of Revenue*, 331 S.W.3d 314, 318 (Mo. banc 2011) (Absent a statutory definition, the plain meaning of words used in a statute, as found in the dictionary, is typically relied on). “Patent” means “open to view : readily visible or intelligible.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1654 (unabr.1986). “Offensive” means “causing displeasure or resentment: giving offense.” *Id.* at 1566. “Insulting” and “affronting” are synonyms. *Id.* “Decency” is “whatever is proper or becoming : standards of propriety.” *Id.* at 584. We determine from these definitions that “SEX DOC” is neither patently offensive nor offensive to good taste or decency.³

“SEX DOC” describes Turner’s profession. There is no suggestion that his profession is illegal or immoral. The plate has been allowed in at least one other state, there is no evidence that any similar plates have provoked complaints from the public, and the word sex is not obscene. We conclude that Turner met his burden of proof to show that the license plate is not obscene, patently offensive, or offensive to good taste and decency.

Summary

Turner is entitled to a license plate with the configuration SEX DOC.

SO ORDERED on June 10, 2014.

/s/ Karen A. Winn

KAREN A. WINN

Commissioner

³ We express no opinion on the other examples of license plates containing the word “sex” that have been rejected by the Director.